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No. ____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SCRIPPS-HOWARD BROADCASTING COMPANY,
ERIC BRAUN, and LARRY SCHOCK,
Petitioners,

v.

LESTER J. BARBER and JANET E. BARBER,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRUCE W. SANFORD
Counsel of Record
LOUIS A. COLOMBO
LEE LEVINE
BRIAN S. HARVEY
BAKER & HOSTETLER
818 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 861-1500

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED FOR REVIEW

Whether the Constitution requires that this Court undertake an independent review of the record and reinstate summary judgment in a defamation action when the plaintiffs, both "public officials," have failed to produce any evidence that the news report at issue was published with "actual malice."*

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*The majority of the shares of petitioner Scripps-Howard Broadcasting Company is owned by The E. W. Scripps Company, a privately held corporation. Scripps-Howard Broadcasting Company has an approximate 50 percent participation in four partnerships: Cablevision of Connecticut, Ann Arbor Cablevision, Cablevision Systems of Southern Connecticut, and Cablevision of Sacramento.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioners, Scripps-Howard Broadcasting Company, Eric Braun, and Larry Schock, respectfully pray that a writ of certiorari issue to review the judgment and order of the Supreme Court of Ohio entered in this defamation action on April 18, 1984.

OPINIONS BELOW

The opinion of the Court of Common Pleas for Stark County, Ohio, the opinion of the Court of Appeals for Stark County, Ohio, and the order of the Ohio Supreme Court are all unpublished and are all included in the Appendix hereto.

JURISDICTION

The judgment of the Ohio Supreme Court, declining to review the reversal by the court of appeals of the trial court's entry of summary judgment for petitioners, was

entered on April 18, 1984. This petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

1. First Amendment, United States Constitution:

   Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

2. Fourteenth Amendment, Section 1, United States Constitution:

   [N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

A. Preliminary Statement

On February 10, 1982, petitioner Scripps-Howard Broadcasting Company, which owns and operates television station WEWS in Cleveland, Ohio ("the Station"), broadcast a news report stating accurately that sheriff's deputies had seized a motorboat during a search at the home of the Fire Chief of Lexington Township, Ohio, and that police officials planned to seek indictment of the Chief in connection with his possession of the boat. At the time of the search, the boat—which had been reported stolen—was obscured from view behind a garage in the Chief's back yard by a truck camper top, tarpaulins, and plywood.

Despite ample discovery by all parties, the record is wholly devoid of evidence that this news report was broadcast with "actual malice," *i.e.*, knowledge of falsity or a high degree of awareness of probable falsity, or that it is not substantially accurate. Accordingly, the trial court granted summary judgment for the Station and

dismissed the Complaint. The Court of Appeals for Stark County, Ohio, however, chose to ignore this basic evidentiary failure and reversed the trial court's decision. In its haste to remand for further proceedings, the court of appeals created from whole cloth evidence which, as the record readily reveals, simply does not exist. Then, in plain derogation of the *constitutional* obligation of appellate courts to undertake an independent review of the record in defamation cases, *see Bose Corp.* v. *Consumers Union*, 52 U.S.L.W. 4513 (U.S. April 30, 1984) (No. 82-1246), the Ohio Supreme Court summarily declined to review the instant case on the ground that "no substantial constitutional issue exists." Appendix to Petition for Certiorari at 1a [hereinafter cited as App.].

The news report at issue accurately informed the public about an official search and seizure undertaken by local police authorities, pursuant to a lawfully issued judicial warrant. It accurately recounted allegations of criminal wrongdoing which *police* had leveled against a public official, and which constituted probable cause for the search. The record in the instant case—fully developed by numerous depositions—documents in detail these official actions and charges by police. The record demonstrates that the Station did no more than report accurately to the public the daily workings of the criminal justice system in Stark County, Ohio, a matter of obvious concern to that community.

By reversing the summary judgment granted to the Station, the Ohio appellate courts once again have rendered it virtually impossible for television stations in Ohio accurately to report on law enforcement activity without facing the specter of debilitating defamation liability.[1] By

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[1] In *Embers Supper Club, Inc.* v. *Scripps-Howard Broadcasting Co.*, 9 Ohio St.3d 22, 457 N.E.2d 1164, *cert. denied*, 52 U.S.L.W. 3874 (U.S. June 4, 1984) (No. 83-1653), the Ohio Supreme Court

sanctioning the court of appeals' abandonment of the record before it, the Ohio Supreme Court has made clear that Ohio television stations now risk interminable litigation in all defamation suits based on news reports of police action, however accurate the report and diligent the reporters. Such an approach can serve only to punish news organizations for performing their proper role or, worse, to dissuade them from informing the public about the bases for police searches, arrests, and other official actions premised upon a prior showing of probable cause. Clearly, the prospect of such self-censorship cannot augur well for either the deterrence of crime or the comprehensibility of a society ordered by law.

Because the decision below rests upon a gross misapplication of elementary principles of the constitutional law of defamation, the Station prays that its petition for certiorari be granted. Indeed, the remarkable disregard of the record displayed by both Ohio appellate

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reversed a directed verdict that had been granted to an Ohio television station in a defamation action that was premised upon accurate reports of a police raid and the probable cause for the raid. Despite the failure of the plaintiff in *Embers* to demonstrate at trial that the news reports at issue there were inaccurate, or that the television station had been at fault in any sense, the Ohio Supreme Court remanded for a second trial. Together with *Embers*, the instant case reveals the resolve of the Ohio appellate courts to penalize Ohio news organizations at every opportunity in the most frivolous of defamation suits. By repeatedly refusing to dispose of clearly meritless libel claims short of a lengthy and expensive trial, or, as in *Embers*, *two* trials, the Ohio appellate courts' approach can, in the long run, only serve to deprive the public of valuable information about the activities of law enforcement agencies and the commission of crime in their communities.

courts warrants this Court's summary reversal of the decision below, pursuant to S. Ct. R. 23.1.[2]

B. Procedural History

On February 10, 1982, Detective William L. Johnson of the Stark County, Ohio Sheriff's Office obtained a judicial warrant to conduct a search for a stolen motorboat at the home of respondent, Lexington Township Fire Chief Lester J. Barber. That same day, Detective Johnson and two deputies conducted the search and confiscated the motorboat from Chief Barber. On July 29, 1982, Chief Barber and his wife, respondent Janet E. Barber, the elected Clerk of Lexington Township, instituted this action in the Court of Common Pleas for Stark County, Ohio against Detective Johnson; Robert Berens, Sheriff of Stark County; Stark County itself; Stark County's three County Commissioners; the Station; Larry Schock, a professional broadcast journalist who works as a "stringer" for the Station; and Eric Braun, the Station's news director. Chief and Mrs. Barber asserted an array of allegations, including conspiracy, trespass, defamation, and invasion of privacy.

After all parties were afforded ample opportunity for discovery, the Station moved for summary judgment on the ground, *inter alia*, that both plaintiffs are "public officials" and, as such, had not and could not sustain their burden of demonstrating that the news report at issue was broadcast with "actual malice" as that term has been defined by this Court. Based upon the record evidence,

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[2] Simultaneously with the filing of this petition, the Station is requesting the clerk of the court possessed of the record to certify the record and provide for its transmission to this Court, pursuant to S. Ct. R. 19.1, in order to expedite this Court's independent review of the record. *See* Bose Corp. v. Consumers Union, 52 U.S.L.W. 4513 (U.S. April 30, 1984) (No. 82-1246).

which consisted of affidavits and several depositions, the trial court ruled that the news report at issue is "essentially true." App. 18a. In addition, the court declared that both Chief and Mrs. Barber are "clearly public officials" and concluded that since the news report at issue contains "no factual inaccuracy," they had not satisfied their burden to demonstrate "actual malice." App. 19a. Accordingly, the trial court granted the Station's motion for summary judgment. App. 20a.[3]

On December 29, 1983, a three-judge panel of the Court of Appeals of Stark County, Ohio reversed the summary judgment. App. 2a, 16a. On April 18, 1984, the Ohio Supreme Court denied review of that decision. App. 1a, 21a.

C. How Federal Question Is Presented

The federal constitutional requirement that, in a defamation action instituted by a public official, the plaintiff must demonstrate that a news report was published with "actual malice" was presented to the trial court upon the Station's motion for summary judgment. The Station continued to advance this federal constitutional requirement in the court of appeals and in the state supreme court. In the Ohio Supreme Court, the Station advanced the federal constitutional requirement that an appellate court in a defamation action must undertake an independent review of the entire record to ensure that the judgment below does not constitute an infringement of First Amendment rights.

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[3] The trial court also dismissed the Barbers' allegations of trespass, invasion of privacy, and conspiracy, and granted motions to dismiss filed by the Stark County defendants. The Barbers failed to appeal from the trial court's rulings with respect to these issues, and they are not before this Court.

D. Statement Of Facts

The Plaintiffs

Respondent Lester J. Barber has been Fire Chief for Lexington Township, Ohio since 1967, when the Township Board of Trustees appointed him to that position. Deposition of Lester Barber at 6 [hereinafter cited as L. Barber Dep.]. Respondent Janet E. Barber, his wife, is the elected Clerk of Lexington Township. Deposition of Janet Barber at 3-4 [hereinafter cited as J. Barber Dep.].

Chief Barber's Retention And Concealment Of The Stolen Motorboat

In July 1978, Chief Barber "found" a 14-foot Lonestar runabout motorboat upside down in Berlin Reservoir, a recreational lake near Akron, Ohio. L. Barber Dep. at 7. The boat was equipped with a 40-horsepower outboard motor, and was suitable for water skiing. Deposition of William Johnson at 49; *id.*, Exh. 2 [hereinafter cited as Johnson Dep.]. The motorboat, like all Ohio watercraft, bore a registration number similar to an automobile license plate, and its true owner—Mr. Gene Dawson—could readily have been identified through this number by telephoning the Ohio Bureau of Watercraft in Columbus, Ohio. *Id.* at 45-47, 76. The boat had been stolen from Dawson. *Id.* at 45, 48.

Chief Barber, however, did not bother to contact either the Ohio Bureau of Watercraft or Dawson about the stolen boat. L. Barber Dep. at 12. Although Chief Barber "asked a number of people" to "run the [boat's] numbers," he *never* did so himself. *Id.* at 8-13. Indeed, these efforts were limited, so far as Chief Barber knows, to an inquiry as to whether law enforcement agency computers indicated the boat had actually been reported as stolen or missing. *Id.* at 9, 13.

Instead, Chief Barber and others at the Fire Department planned, he claimed, "to make a boat out of it for the fire department." *Id.* at 15. Thus, Chief Barber placed the boat upon his own trailer and, for most of the next three and a half years, kept it behind a garage in his own back yard. *Id.* at 13, 15, 26; Johnson Dep. at 19, 74. The boat was concealed and obscured from view. *Id.* at 19, 117. Plywood had been piled against it and tarpaulins were draped over it. Affidavit of Larry Schock ¶ 16(h) [hereinafter cited as Schock Aff.]; Deposition of Larry Schock at 32 [hereinafter cited as Schock Dep.]. A truck camper top had also been placed over the boat. Schock Aff. ¶ 16(h); Schock Dep. at 32.

The Search And Seizure

On or about February 8, 1982, the Stark County Sheriff's Office received a report that Chief Barber had been concealing a stolen motorboat—that it was "covered up" "behind a garage" in the Chief's own back yard—and that the boat would soon be taken to a repair shop for repainting. Johnson Dep. at 19, 74; *id.*, Exh. 1. Thereafter, Detective William Johnson, a Stark County Sheriff's deputy, began an official investigation with respect to criminal liability arising from Chief Barber's possession of the boat. In order to secure a search warrant for Chief Barber's premises, on February 10, 1982, Detective Johnson executed an affidavit in which he swore that an informant had "personally observed the boat covered by a truck cap and plywood" at Barber's home. *Id.* at 29, 55; *id.*, Exh. 1. Indeed, Detective Johnson stated, under oath:

> I have personally observed the area to be searched and have confirmed that an object is *concealed* under a truck cap and plywood at the side of the garage as described as the *hiding* place of the boat by informants.

Id., Exh. 1 (emphasis added). The boat's registration numbers had been provided to Detective Johnson by the informants, and Detective Johnson subsequently placed a telephone call to the Ohio Bureau of Watercraft, which quickly identified Gene Dawson as the boat's owner. *Id.* at 45-46. Detective Johnson then contacted the owner—"the first logical thing you do" as a public officer when encountering abandoned property. *Id.* at 47, 76. Dawson confirmed to Detective Johnson that he did own the boat and that it had indeed been stolen. *Id.* at 48.

Based on Detective Johnson's affidavit, on February 10, 1982, Judge William A. Morris of the Stark County, Ohio Court of Common Pleas issued a search warrant, which states that, at Chief Barber's address:

> There is now being *concealed* certain property, namely . . . . One 1959 Lonestar runabout outboard motorboat . . . , [and a] 40 HP Johnson outboard motor . . . which are . . . *evidence of the commission of a criminal offense, Receiving Stolen Property* . . . and I am satisfied that there is probable cause to believe that the property so described is being *concealed* on the premises above described.

Id., Exh. 2 (emphasis added).

Prior to the issuance of the search warrant, the Stark County Sheriff's Office, on February 9, 1982, had contacted petitioner Larry Schock, a professional broadcast journalist who covers news events for the Station in the Stark County area. Schock Aff. ¶ 1; Affidavit of Eric Braun ¶ 9 [hereinafter cited as Braun Aff.]. The Sheriff's Office requested Schock to accompany a deputy sheriff as a statutorily required independent witness in the execution of the search warrant. Schock Aff. ¶ 8.

At 1:30 p.m. on February 10, 1982, Schock met with Detective Johnson and was informed by him that the Sheriff's Office was going to seize what was believed to be

a stolen boat that had been missing for over two years. Schock Aff. ¶¶ 8, 9. Detective Johnson and two other uniformed deputies then proceeded to the Barber premises in three police cruisers to perform the search. Johnson Dep. at 84.[4] Upon his arrival, Detective Johnson observed that the boat "was covered up" and "concealed from view." *Id.* at 19, 117. As Detective Johnson stated in his official Report of Investigation: "It was nearly impossible at first glance to determine whether there was a boat concealed or not." *Id.*, Exh. 4. Schock, who had driven in his own car, videotaped the search and the seizure of the boat. He also observed that the boat "was obscured by a camper top that was on it." Schock Aff. ¶ 16(h). According to Schock, the boat was covered with tarpaulins; plywood and other materials were piled on or against it. Schock Aff. ¶ 16; Schock Dep. at 32. Over the course of 30 to 45 minutes, the deputies uncovered the boat. Schock Dep. at 32. Detective Johnson and the other deputies "turned my garage upside down," in Chief Barber's words, in order to locate an outboard motor, life jackets, a fire extinguisher, and other items of equipment listed in the warrant as being in the Chief's possession. L. Barber Dep. at 34. The deputies then removed the stolen boat from Chief Barber's property. *Id.*

At the time of the search, Detective Johnson told Schock that he was going to take the evidence seized at Chief Barber's residence to the grand jury, and that the grand jury might indict the Chief as a result. Johnson Dep. at 110-11, 116; Schock Aff. ¶ 14. Detective Johnson's search warrant, which Schock also reviewed, makes clear that the boat was to be seized for use as "evidence of the commission of a criminal offense, Receiving Stolen Property." Johnson Dep., Exh. 2; Schock Dep. at 36-37.

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[4] Chief Barber, whose Complaint in the instant case characterizes the search as "a raid," stated on deposition that "eight cruisers" were involved. L. Barber Dep. at 30.

During the search, Schock spoke with Chief Barber. Schock Aff. ¶ 11. The Chief advised Schock of his alleged efforts to determine whether the boat had been reported as stolen, and claimed he had been unable to ascertain its ownership. *Id.* ¶ 13.[5] Lexington Township Police Chief Paul Kelley also claimed he had been unable to learn the owner's identity. *Id.* ¶ 16(d). Schock, however, also discussed the boat's ownership with Detective Johnson, who said he had simply telephoned the Ohio Bureau of Watercraft in Columbus, Ohio with the boat's registration number, and that the owner was thereby identified in less than ten minutes. *Id.* ¶¶ 13, 16(e); Johnson Dep. at 46.

The News Report At Issue

Following the search, Schock went to the Sheriff's Office and obtained additional facts necessary to prepare a news report concerning events at the Fire Chief's home. Schock Dep. at 33. He then transmitted the videotape to the Station in Cleveland from its transmission facility in Akron, Ohio, and telephoned the facts he had compiled to the Station. *Id.* at 48-50.

Among the facts Schock reported were the following: That on February 10, 1982, Stark County deputy sheriffs had descended unannounced on the home of Fire Chief Lester J. Barber to serve a search warrant for a boat that had been reported as stolen; that the Sheriff's Office in fact found and seized a motorboat that had been recovered from the Berlin Reservoir about two and a half years previously; that Fire Chief Barber and Police Chief Paul Kelley, both of whom were present when the boat was

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[5] Although Chief Barber told Schock that the boat's registration numbers had been "referred" to the Ohio Bureau of Watercraft, Chief Barber later admitted, under oath, that he had *not* contacted the Bureau himself and that, so far as he knew, neither had anyone else. L. Barber Dep. at 12-13.

recovered, claimed they had been unable to find the boat's owner; that the Sheriff's Office, however, had found the owner in a matter of minutes by checking the registration number; that the boat was found in Fire Chief Barber's back yard obscured by a camper top that was on it and tarpaulins and plywood piled on or against it; that either Fire Chief Barber or Police Chief Kelley had been in possession, custody, and control of the boat at all times following its recovery from the Berlin Reservoir; that Detective Johnson planned to present his evidence to the grand jury and to seek indictments against those involved in the incident; and that there was a possibility that both Chief Barber and Police Chief Kelley would be indicted for their roles in the matter since each had been present when the boat was retrieved, each claimed to have attempted to find the owner, and neither had located the owner. Schock Aff. ¶ 16. When he reported the foregoing facts, Schock was convinced that they were accurate in every respect. *Id.* ¶ 17.

In its evening news program on February 10, 1984, the Station broadcast a news report, accompanied by videotape, about the service of the warrant and the search for the boat. Braun Aff. ¶ 12. The text of the news report at issue states:

> [Introduction at beginning of news program:] A police and fire chief in Stark County appear to be in lots of hot water. The exclusive details, next.
>
> . . . .
>
> Both the police and fire chiefs in Lexington Township may soon be indicted. Today Stark County Sheriff [sic] deputies swooped down on the home of Fire Chief Lester Barber. They found a small motorboat recovered from Berlin reservoir 2-1/2 years ago. The Chief, and Police Chief Paul Kelley claim they couldn't find the boats [sic] owner. But using the

> boat's registration number police found the owner just like that. [Detective Johnson speaking on tape:] 'It took approximately five to eight minutes to determine the proper owner of the boat through . . . a telephone call to the Bureau of Watercraft, Columbus, Ohio.' Johnson will present his evidence to the grand jury, and ask indictments against both the police and fire chief for hiding the boat.

Id. ¶ 12.

The Decisions Below

Based on the foregoing undisputed facts, the trial court granted the Station's motion for summary judgment. The trial court ruled that both plaintiffs are public officials and are therefore required to prove "actual malice," that the plaintiffs had failed to satisfy this burden, and that the "gist or sting" of the news report at issue is true. App. 17a-20a. The court of appeals reversed. It agreed that both plaintiffs are public officials, but concluded that factual issues exist as to whether the news report at issue was broadcast with "actual malice." App. 4a-16a.

The court of appeals' opinion seriously and disingenuously misrepresents the record. By ignoring uncontroverted evidence that the boat was "covered up" with a camper top, tarpaulins, and plywood, and that the search warrant itself had been issued for seizure of a boat "concealed" in a "hiding" place on the Chief's premises, Johnson Dep. at 75, 117; *id.*, Exh. 1; *id.*, Exh. 2; Schock Dep. at 32; Schock Aff. ¶ 16(h), the appellate court fabricated a factual issue as to "whether the boat was hidden," App. 10a. Then, in order to concoct a factual issue as to "actual malice," the court of appeals actually *rewrote* the news report at issue, and changed the Station's statement that Fire Chief Barber and Police Chief Kelley "*may* soon be indicted" to a statement that Chief Barber and Police Chief Kelley "*were* 'soon to be indicted.' " App. 13a. Fur-

ther, despite Detective Johnson's statements to Schock (a) that he would seek an indictment, (b) that Chief Barber could be one of the individuals indicted, and (c) that any charges would be based on the Chief's retention and concealment of the stolen boat, Johnson Dep. at 110-11, 117; *id.*, Exh. 2; Schock Aff. ¶ 16, the court of appeals concluded that "[r]easonable minds could find . . . that the assertion that Fire Chief Barber and Police Chief Kelley were 'soon to be indicted' for 'hiding the boat' . . . was made with the knowledge it was false or with a reckless disregard of whether it was true or false," App. 13a.[6]

The court of appeals conjured up another factual issue as to whether Chief Barber had *intended* to conceal the boat and deemed this purported dispute material because, in the court's view, Chief Barber's "state of mind" about the boat somehow is relevant to the determination of whether the Station knew the news report "is false" or "entertained serious doubt" as to its truth. App. 13a-15a. This conclusion, in turn, is premised upon another gross

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[6] The appellate court reached this remarkable conclusion despite Detective Johnson's uncontroverted testimony at deposition:

> Q. Did you tell Larry Schock you were going to take your case to the Grand Jury?
>
> A. Yes.
>
> Q. Did you tell him they may or may not indict either of these individuals named in this story? . . . Did you make that statement with respect to the fire chief?
>
> [objections noted]
>
> A. Yes.
>
> . . . .
>
> Q. Was . . . the boat concealed from view when you arrived on February 10, 1982?
>
> A. Yes.

Johnson Dep. at 110-11, 117. Incredibly, the appellate court concluded: "Johnson did not tell Schock that appellant Barber 'may soon be indicted.' " App. 12a.

mischaracterization of the news report at issue. The court of appeals viewed the news report as charging that Chief Barber was, in fact, *guilty* of violating the section of the Ohio Criminal Code which defines the offense of receiving stolen property and then, looking to the definition and technical elements of the crime, found factual disputes with regard to the Chief's culpability under this statute—none of which bear the slightest relation to the news report at issue. App. 14a-15a.

In a one-sentence order, the Ohio Supreme Court declined to review the court of appeals' decision. App. 21a.

REASONS FOR GRANTING THE WRIT

An Independent Review Of The Record Demonstrates That The Ohio Court Of Appeals Has Failed To Require That The Constitutional Facts Requisite To The Imposition Of Defamation Liability Be Established With Convincing Clarity.

A. Appellate Courts, Including The Appellate Courts Of Ohio, Have A Constitutional Obligation To Undertake An Independent Review Of The Record In Defamation Actions Instituted By Public Officials.

The decision of this Court in *Bose Corp.* v. *Consumers Union*, 52 U.S.L.W. 4513 (U.S. April 30, 1984) (No. 82-1246), makes clear that *all* appellate courts, including the appellate courts of Ohio, are obliged under the First and Fourteenth Amendments in defamation actions instituted by public officials to undertake an " 'independent examination of the whole record,' in order to make sure 'that the judgment does not constitute a forbidden intrusion on the field of free expression.' " *Id.* at 4517 (quoting *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 284-86 (1964)). The requirement of independent appellate review "reflects a deeply held conviction that judges—and particularly members of *this* Court—must exercise

such review in order to preserve the precious liberties established and ordained by the Constitution." *Id.* at 4520 (emphasis added). Indeed, "judicial evaluation of special facts that have been deemed to have constitutional significance," *id.*, is crucial in order to ensure that finders of fact—including judges of lower courts—will not purport to impose defamation liability in derogation of the First Amendment rights articulated in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), and its progeny.

Bose settles, once and for all, that in defamation actions instituted by public officials the plaintiff must produce evidence that establishes, with convincing clarity, that the defendants published defamatory falsehood with at least a reckless disregard of its truth or falsity. Thus, in order to justify a trial upon his claims, the plaintiff must produce *facts* which demonstrate that the allegedly defamatory statement at issue is not substantially accurate, *New York Times Co.* v. *Sullivan*, 376 U.S. at 279; *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340-41 (1974), and that it was published with "actual malice," *New York Times Co.* v. *Sullivan*, 376 U.S. at 279-80, 286, as defined in *St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968):

> There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.

This Court's decision in Bose makes clear that these facts are of "constitutional significance"; no judgment of defamation liability can stand, consistent with the First Amendment, in their absence.

It cannot seriously be disputed that the plaintiffs in the instant case—a Fire Chief and an elected Township Clerk—are both "public officials" within the meaning of this Court's decisions, *e.g.*, *Rosenblatt* v. *Baer*, 383 U.S. 75, 87 (1966), as the courts below correctly held. As such, both plaintiffs are subject to "[t]he federal rule that pro-

hibits a public official from recovering damages for a defamatory falsehood unless he proves that the false 'statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.' " *Bose Corp.* v. *Consumers Union*, 52 U.S.L.W. at 4518 (quoting *New York Times Co.* v. *Sullivan*, 376 U.S. at 279-80). As this Court explained in *Bose:*

> The burden of proving 'actual malice' requires the plaintiff to demonstrate with clear and convincing evidence that the defendant realized that his statement was false or that he subjectively entertained serious doubt as to the truth of the statement.

52 U.S.L.W. at 4520 n.30; *accord*, *Garrison* v. *Louisiana*, 379 U.S. 64, 74 (1964) ("actual malice" standard requires proof of "high degree of awareness of . . . probable falsity").

Moreover, as a matter of federal constitutional law, it is incumbent upon appellate judges to exercise independent appellate review in defamation cases to ensure that the record contains the requisite evidence, demonstrating actual malice with "convincing clarity." As the Court declared in *Bose*:

> The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.'

52 U.S.L.W. at 4520.

B. Independent Review Of The Record Demonstrates That The News Report At Issue Accurately Reported Law Enforcement Activity And Was Not Broadcast With Knowledge Of Falsity Or Serious Doubt As To Its Truth.

In the instant case, an independent review of the record demonstrates that the plaintiffs have not and cannot produce "clear and convincing" proof that the Station, Schock, or Braun "realized that [the news report at issue is] false" or that they "subjectively entertained serious doubt" as to its truth. On the contrary, the record reveals that the news report at issue is an accurate report of law enforcement activities directed at a public official, the very kind of information that lies at the core of the First Amendment.

The record contains no evidence that the Station, Schock, or Braun had any doubt at all—or even bases for any doubt—about the facts that Sheriff's deputies had accused Chief Barber of concealing the boat, and that the boat was indeed hidden. Prior to the search, Detective Johnson observed Chief Barber's premises, and "personally . . . confirmed that an object is concealed under a truck cap and plywood at the side of the garage as described as the hiding place of the boat by the informants." Johnson Dep., Exh. 1. The search warrant itself, which Schock reviewed, repeatedly described the boat as "concealed." *Id.*, Exh. 2; Schock Dep. at 36-37. Subsequently, when the search and seizure occurred, Schock himself observed the boat, as did Detective Johnson, and they both concluded that it was indeed concealed. According to Detective Johnson, at the time of the search the boat was still "covered up," Johnson Dep. at 19, as he had stated in his affidavit, *id.*, Exh. 1. Indeed, as Detective Johnson stated in his official Report of Investigation: "It was nearly impossible to tell at first glance whether there was a boat concealed or not." *Id.*, Exh. 4. Schock also person-

ally observed that at the time of the search the boat was "obscured" from view by a camper top, plywood, and tarpaulins. Schock Aff. ¶ 16(h); Schock Dep. at 32. Sheriff's deputies spent more than 30 minutes uncovering it. *Id.* at 32.[7]

Similarly, Chief Barber has not and cannot produce evidence of convincing clarity that the Station entertained serious doubt as to the truth of the news report's statements that Detective Johnson "will present his evidence to the grand jury, and ask indictments against both the police and fire chief for hiding the boat," and that Chief Barber, "may soon be indicted." With astonishing artifice, however, the appellate court has baldly reconstructed a record which, in the court's view, is somehow ambiguous as to whether Detective Johnson in fact indicated to Schock that he planned to take his evidence to the grand jury and that Chief Barber might be indicted. Simply put, the appellate court has fabricated ambiguity where there is none.

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[7] Chief Barber's assertion that the boat was in "plain sight" clearly does not create any factual issues, since in equally "plain sight" were the camper top, tarpaulins, and plywood which obscured the boat. Similarly, Detective Johnson's deposition testimony that "[a]fter arriving and looking—yes, you could see it . . . if you looked at it long enough you could visualize a boat," Johnson Dep. at 118, creates no factual issues as to the boat's concealment with tarpaulins, a camper top, and plywood, and does not constitute clear and convincing evidence that the *Station* seriously doubted the fact of concealment. Certainly Detective Johnson himself had no such doubts. Not only did he repeatedly testify that the boat was "covered up" and "concealed," Johnson Dep. at 19, 75, 117; *id.*, Exh. 1, but the quoted testimony indicates merely that through prolonged attention ("if you looked at it long enough") and with considerable imagination ("you could visualize"), one might discern that an object in Chief Barber's back yard was "a boat." That the boat was "concealed" is confirmed by Detective Johnson's official Report of Investigation. *Id.*, Exh.4.

An independent review of the record demonstrates that the court of appeals literally *changed* the news report at issue in order to conform to its inapposite analysis. Instead of applying the law to the news report in the instant case, which stated that Chief Kelley and Chief Barber "may soon be indicted," the court of appeals created a different news report stating that "Fire Chief Barber and Police Chief Kelley *were* 'soon to be indicted.' " App. 13a. Appellate courts might well change the law, but no system of ordered justice can tolerate courts that fabricate facts. The Ohio Supreme Court's cavalier refusal to correct the lower court's alarming revision of the record is the very antithesis of responsible appellate review.

Thus, the court of appeals disingenuously misrepresented the news report at issue as charging that Chief Barber was, in fact, guilty of crime. App. 12a-15a. The appellate court, without a scintilla of supporting evidence, then speculated that since Chief Barber was not "desiring to hide" the boat he was not actually "guilty," and viewed Chief Barber's own alleged intentions as support of an inference of "actual malice" on the part of the Station. App. 11a-16a. This analysis stands the rule of *New York Times Co.* v. *Sullivan* on its head. Chief Barber's *own* state of mind with respect to the boat—which of course can be known only by Chief Barber—hardly demonstrates with convincing clarity that the *Station* (or Schock or Braun) subjectively entertained serious doubt as to whether the boat was concealed, particularly in light of their own direct observations of concealment.[8]

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[8] Even if Chief Barber did not "intend" to hide the boat, he must bear the consequences of creating for law enforcement officers the impression of concealment. In view of Chief Barber's status as a public official, such consequences necessarily include public scrutiny of this alleged wrongdoing.

Moreover, it is clear that the news report at issue accused Chief Barber of nothing. It merely reported the allegations asserted against him by police officials, the probable cause for the search of his premises, and the fact that the authorities planned to seek his indictment—*not* that he had been convicted of any criminal offense. The possibility that, in retrospect, the search and the effort to indict Barber may appear to have been ill-advised affords no basis whatever for punishing the *Station*, which merely informed the public of these law enforcement activities. Such an analysis renders it impossible, as a practical matter, for a news organization *ever* to report on a search that has been conducted, an arrest that has been made, or an indictment that has been sought.

The court of appeals further concluded that Detective Johnson had "not exactly" told Schock that Chief Barber "may soon be indicted." App. 14a. This, manifestly, does not constitute the clear and convincing evidence which it is incumbent upon the plaintiffs to produce. Similarly, the appellate court found a triable issue based on the news report's statement that "sheriff [sic] deputies swooped down on the home of Fire Chief Lester Barber." App. 10a. The appellate court apparently concluded that material issues of fact exist because Detective Johnson had

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The appellate court, summoning its unusual "experience and logic," App. 11a, as opposed to evidence contained in the record, speculated that the Station should have doubted whether Chief Barber really intended to conceal the boat because it would be difficult to hide effectively a 14-foot motorboat out-of-doors on one's own property for three years. This reasoning is nothing short of ludicrous; the presence or absence of "actual malice" on the part of the Station does not turn on how effectively Chief Barber hid the boat. Moreover, the test for "actual malice" is *not* whether a defendant "should have known" of probable falsity, but whether the defendant "*in fact* entertained serious doubts as to the truth of his publication." St. Amant v. Thompson, 390 U.S. at 731 (emphasis added).

had "not exactly" "swooped down." The appellate court, however, wholly disregarded the fact that Chief Barber himself expressly *admitted* the truth of this statement, L. Barber Dep. at 25, thereby conclusively removing from the instant case any possible factual dispute on this issue.[9]

Further, the appellate court's wooden insistence upon a news report that "exactly" recites each word of the verbatim language used by every participant in a newsworthy event abandons law and credulity. It is well established that verbatim accounts of police charges of wrongdoing and police action are *not* required. Indeed, the importance of educating the public promptly and clearly about law enforcement and official wrongdoing demands that courts tolerate news accounts which eschew hypertechnical language. As the court declared in *Orr* v. *Argus-Press Co.*, 586 F.2d 1108, 1117 (6th Cir. 1978), *cert. denied*, 440 U.S. 960 (1979):

> The publicity which the press gives to such cases plays an important role in our system of criminal justice because it informs the public about the law, warns the public of harm and serves to deter law violations. The press functions in such cases as one of

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[9] Indeed, this statement is a substantially accurate figure of speech properly used to describe the uncontroverted facts that (a) several sheriff's deputies descended unannounced upon Chief Barber's home (Chief Barber himself (erroneously) asserts that "eight cruisers" were present); and (b) armed with a search warrant, the deputies confiscated property and, as the Chief himself phrases it, "went inside my garage and turned it upside down." Schock Aff. ¶ 16; L. Barber Dep. at 30, 34. This Court has long held that the use of mere hyperbole or figures of speech does not constitute actionable defamatory falsehood. Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6, 14 (1970). By reversing on the basis of the Station's use of the phrase "swooped down" to describe what Chief Barber's own Complaint herein calls a "raid," the appellate court has trivialized the judicial process by establishing itself as an arbiter of style, not of substance.

> the sanctions in our system. Only by receiving information about our legal system, including its defects and mistakes, can the public learn about the law and the moral principles on which it is based, as well as the law's capacity for self correction and stability. In reporting on this case, therefore, the newspaper was simply performing its assigned role.
>
> Like the readers for whom they write, few newspaper reporters are lawyers; yet they must often report under a short deadline complex accusations and arguments in colloquial language that the average reader can understand. Sometimes, as in this case, lawyers have spent hours preparing charges and arguments that the reporter must summarize in a few short paragraphs in a few minutes.
>
> Because of the public importance of reporting on cases of this kind, the law must allow some leeway for misinterpretation and error.

Accord, *Simonson* v. *United Press International Inc.*, 654 F.2d 478, 482 (7th Cir. 1981); *Lambert* v. *Providence Journal Co.*, 508 F.2d 656 (1st Cir.), *cert. denied*, 423 U.S. 828 (1975); *Williams* v, *WCAU-TV*, 555 F. Supp. 198 (E.D. Pa. 1983); *see Seymour* v. *A. S. Abell Co.*, 557 F. Supp. 951, 956 (D. Md. 1983) ("a long line of cases holds that technical errors in legal nomenclature in reports of matters involving violation of the law are of no legal consequence").

These principles are particularly apposite where, as in the instant case, there has been *no* misinterpretation. Independent review of the record admits of no doubt whatever that the Station's use of the term "swooped down" accurately and fairly described the unannounced search and seizure, L. Barber Dep. at 30-34, as Chief Barber has acknowledged, *id.* at 25; that Detective Johnson *did* plan to seek indictment of Chief Barber based on his possession of a stolen boat that appeared to be hidden

on the Chief's property, Johnson Dep. at 111; *id.*, Exh. 1, *id.*, Exh. 2; and that Detective Johnson had, in fact, indicated to Schock that Chief Barber may soon be indicted, *id.* at 110-11. It is absurd to suggest that Schock doubted these matters, since Detective Johnson's own uncontroverted testimony on them is clear.[10] When the

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[10] The appellate court lunged at an exchange in Detective Johnson's deposition and concluded that, because the Detective did not answer the pending question by stating that he told Schock that Chief Barber may soon be indicted, the Detective must not have so told Schock. App. 12a-13a. This *non sequitur* is wholly belied by the record. Detective Johnson actually testified as follows:

Q. I'm going to read from that [news report] and you tell me if I read this correctly. 'Both the police and fire chiefs in Lexington Township may soon be indicted.' Did I read that correctly?

A. Yes.

Q. I'm asking you, based on your being the individual who was in charge of this investigation into Les Barber, is that statement contained in that first sentence a true statement as of February 10, 1982?

[objections noted]

A. Not necessarily.

Q. Would you care to explain your answer?

A. If I took the case to the Stark County Grand Jury the search warrant is for the property of Les Barber.

As for the police, as to their involvement, I can't serve a search warrant on a property and prepare the case and take it to Grand Jury and predict who they're going to indict. The property, being Les Barber's, or the property being a boat, was found and located and returned to its proper owner. The Grand Jury could indict or could not indict at their vote.

The property owner, if the Grand Jury felt that someone assisted him, they may choose to indict. That's why I said I will submit my evidence to the Stark County Grand Jury and get indictments against whomever is responsible.

. . . .

Q. *Did you tell Larry Schock you were going to take your case to the Grand Jury?*

A. *Yes.*

plaintiff has not produced clear and convincing evidence of doubt—much less *serious* doubt—summary judgment against the plaintiff is compelled. News reports which concern law enforcement and police charges of official misconduct must be granted "the breathing space that gives life to the First Amendment." *Bose Corp.* v. *Consumers Union*, 52 U.S.L.W. at 4251. The requirement imposed by the Ohio appellate courts that such a news report "exactly" mirror the precise language of sources is plainly inconsistent with the teaching of *Bose*.

Finally, that the decision below begs review in this Court is most graphically demonstrated by the reversal of the grant of summary judgment as to petitioner Braun. The record is devoid of evidence that Braun, the Station's news director, was even aware of the news report at issue on the date of its broadcast, much less that he "realized" it "was false" or "subjectively entertained serious doubt" as to its truth. On the contrary, the record demonstrates that Braun neither reviewed nor participated in the preparation of the news report at issue in any way. Braun Aff. ¶ 9; *see* Schock Dep. at 48-50. The failure of the court of appeals to affirm the trial court's summary disposition of the claims against Braun flies in the face of this Court's admonition that states may not impose defamation liabil-

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Q. *Did you tell him they may or may not indict either of these individuals named in this story?*

[objections noted]

Q. *Did you make that statement with respect to the fire chief?*

A. *Yes.*

Q. *Okay. That they may or may not indict?*

A. *That's right.*

Johnson Dep. at 107-11 (emphasis added). Contrary to the appellate court's disingenuous misreading of Detective Johnson's "not necessarily" response, this exchange clearly demonstrates that Schock had no basis to doubt Chief Barber's possible indictment.

ity without a showing of fault. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. at 339.[11]

CONCLUSION

The news report at issue accurately informed the public about law enforcement activity. As such, it epitomizes one of the most commonplace services rendered by local television news. Moreover, because the report concerned charges of wrongdoing against an individual entrusted with public responsibility, its publication goes to the essence of the First Amendment. By failing to perform its constitutional duty to ensure that the record contains the evidence mandated by the First Amendment, the Ohio Supreme Court once again has erected for Ohio news media a formidable obstacle to reporting on law enforcement activity and charges of official impropriety. Considered together with the Ohio court's decision in *Embers Supper Club, Inc.* v. *Scripps-Howard Broadcasting Co.*, 9 Ohio St.3d 22, 457 N.E.2d 1164, *cert. denied*, 52 U.S.L.W. 3874 (U.S. June 4, 1984) (No. 83-1653), the decision below can only result in suppression of information about the activities of government and public officials—the Procrustean result which this Court so forcefully rejected in *New York Times Co.* v. *Sullivan*. If a community television station must bear the burden—through years of costly litigation—of a public official's own inability to produce evidence that the station harbored serious doubts as to the truth of its broadcast about

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[11] The Ohio appellate courts' refusal to sustain the summary judgment granted to the Station as to Mrs. Barber's claims is further evidence of their failure to pay even lip service to the record in the instant case, since, as Mrs. Barber herself has acknowledged, the news report at issue makes no reference to her of any kind. J. Barber Dep. at 5. It is well established that the First Amendment precludes the imposition of defamation liability based on a news report which is not "of and concerning" the plaintiff. New York Times Co. v. Sullivan, 376 U.S. at 288.

him, it often will choose simply to omit or truncate coverage of law enforcement activity involving public officials. It is precisely for this reason that when a public official's defamation claims are exposed as meritless at the summary judgment stage, *New York Times* mandates that the case be weeded out. After the plaintiff has had every opportunity to obtain proof of "actual malice," but has failed to do so, trial upon his claims is but a needless—and futile—waste of judicial resources.

Ultimately, incessant and unwarranted litigation of frivolous libel claims can only serve to deprive the public of information—crucial to our system of self-government—about law enforcement activities and official charges of governmental wrongdoing.

Respectfully submitted,

BRUCE W. SANFORD
Counsel of Record

LOUIS A. COLOMBO
LEE LEVINE
BRIAN S. HARVEY
BAKER & HOSTETLER
818 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 861-1500
Counsel for Petitioners

APPENDIX

APPENDIX A

[Order delivered upon rendering of judgment by the Supreme Court of Ohio]

IN THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, City of Columbus

1984 TERM

To wit: April 18, 1984

No. 84-342

LESTER J. BARBER,
Appellees/Cross-Appellants,
v.
SCRIPPS-HOWARD BROADCASTING CORP. *et al.*,
Appellants/Cross-Appellees.

APPEAL AND CROSS-APPEAL FROM THE COURT OF APPEALS FOR STARK COUNTY

This cause, here on appeal as of right from the Court of Appeals for Stark County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court *sua sponte* dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Stark County for entry.

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

APPENDIX B

[Judgment and Opinion by the Court of Appeals for Stark County, Ohio]

IN THE COURT OF APPEALS
FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

CASE NO. CA 6254

LESTER J. BARBER and
JANET E. BARBER
Plaintiffs/Appellants,

v.

SCRIPPS-HOWARD BROADCASTING CORPORATION, ERIC BRAUN, LARRY SCHOCK, WILLIAM JOHNSON and ROBERT BERENS
Defendants-Appellees.

FILED
HELEN J. GAROFALO
Clerk of Courts
STARK COUNTY, OHIO
DEC 29, 1983 1:08 PM

JUDGMENT ENTRY

For the reasons stated in the Memorandum-Opinion on file, the judgment of the Court of Common Pleas of Stark County, Ohio is reversed as to defendants-appellees Scripps Howard [sic] Broadcasting Corporation, Larry Schock and Eric Braun and this case is remanded to that Court for further proceedings according to law and con-

sistent with our opinion on file. The judgment of the Court of Common Pleas of Stark County, Ohio, as to defendants-appellees William Johnson and Robert Berens is affirmed.

IN THE COURT OF APPEALS
FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

CASE NO. CA 6254
Decided: Dec. 29, 1983

LESTER J. BARBER and
JANET E. BARBER
Plaintiffs/Appellants,

v.

SCRIPPS HOWARD BROADCASTING
CORPORATION, ERIC BRAUN,
LARRY SCHOCK, WILLIAM JOHNSON
and ROBERT BERENS
Defendants-Appellees.

OPINION

JUDGES

Hon. Norman J. Putnam, P.J.
Hon. John R. Milligan, J.
Hon. John R. Hoffman, J.

APPEARANCES

DAVID A. LIEBERTH, ESQ.
277 South Broadway
Akron, Ohio 44308

and

JEFFREY JAKMIDES, ESQ.
441 East Main Street
Alliance, Ohio 44601
COUNSEL FOR APPELLANTS

LOUIS A. COLOMBO
DAVID L. MARBURGER
BAKER & HOSTETLER
3200 National City Center
Cleveland, Ohio 44114

and

WILLIAM A. LEFAIVER
GUREN, MERRITT, FEIBEL,
SOGG & COHEN
700 Terminal Tower
Cleveland, Ohio 44113
COUNSEL FOR APPELLEES

Stark County, Case No. CA 6254

HOFFMAN, J.

This is an appeal taken from summary judgment rendered in favor of Scripps Howard Broadcasting, Eric Braun, Larry Schock, William Johnson and Robert Berens, defendants-appellees herein.

Plaintiffs-appellants herein Lester J. Barber and Janet Barber sued the above appellees for libel, invasion of privacy and trespass.

Appellants' complaint arose out of the execution of a search warrant at their home on February 10, 1982. Lester Barber, the volunteer Fire Chief of Lexington Township and Mrs. Barber were at home when Detective William Johnson of the Stark County Sheriff's Department arrived accompanied by two other officers and appellee Schock, a "stringer reporter" for appellee, Scripps Howard Broadcasting Corporation (T.V. 5 in Cleveland).

There is undisputed testimony that Schock began filming the incident from the beginning and continued throughout the serving of the warrant and the search that ensued. The main object of the search was a 14-foot boat owned by one Gene Dawson of Canton, Ohio. On January 28, 1982 Dawson belatedly reported the boat as having been stolen in August of 1979 from Berlin Reservoir. In reality the boat had been missing from Dawson since July 1978 when appellant Barber, Lexington Police Chief Paul Kelley, a Stark County Sheriff's officer and a fourth officer recovered the boat from Berlin Reservoir after receiving a call from the Lexington Police Department of a boating accident. They found the boat upside down in the water. Dawson stated he had left the boat tied to the shore in a public area and returned a day later to find it gone. (Report of investigation February 8, 1982, page 3). A 1967 Johnson outboard motor was attached to the boat. Detective Johnson admits in his deposition that a record was made of his department's involvement in the recovery at that time. (Johnson Dep. at 66).

Police Chief Kelley contacted the Alliance Police Department (dispatcher Stella Gruz) who transmitted the boat's registration numbers to the statewide NCIC computer in an attempt to identify the owner of the boat.

Subsequently, appellant Barber asked for assistance from the Coast Guard, the Army Corps of Engineers and

local Sheriffs' Departments. The Coast Guard responded to Barber that "there is no such boat." (Barber Affidavit [sic] at 11).

Immediately upon being served with the warrant by Deputy Johnson, Barber advised him that no search warrant was necessary, that the boat was behind his garage and had been there for some months. Prior to that, the boat had been stored in the Township Fire Station and before that it had been in the Barber backyard, according to appellant Barber.

Barber has testified that his department's practice is to store recovered items from Berlin Reservoir in the fire station, and to store a department fire truck on his property, a few doors away from the station. (Barber Dep. at p. 18).

Johnson advised appellants that the boat had been stolen and caused it to be removed and returned to Dawson. The motor in question was lying in the boat. There is conflicting testimony between Schock and Lester Barber as to what dialogue they had that day, but Schock has averred that Barber told him of his attempts to locate the boat's owner. (Schock Aff., Para. 13).

Reporter Schock telephoned his information to T.V. Channel 5 and microwaved his videotape to the station. A writer or writers in the news department of T.V. 5 prepared the actual news copy, called a "story" which was broadcast that same night.

First came this introductory "teaser":

> A Police and Fire Chief in Stark County appear to be in lots of hot water. The exclusive details, next.

Then the broadcast itself, the lead story of the newscast:

> Both the Police and Fire Chiefs in Lexington Township may soon be indicted. Today Stark County Sheriff's Deputies swooped down on the home of Fire Chief Lester Barber. They found a small motorboat recovered from Berlin Reservoir 2½ years ago. The Chief, and Police Chief Paul Kelley claim they couldn't find the boat's owner. But using the boat's registration number Police found the owner *just like that.* (Announcer's emph.).
>
> > "It took approximately five to eight minutes to determine the proper owner of the boat through the . . . a telephone call to the Bureau of Watercraft, Columbus, Ohio." (Johnson's voice on tape).
>
> Johnson will present his evidence to the Grand Jury and ask indictments against both the Police and Fire Chief for hiding the boat.

Neither Fire Chief Lester Barber or Police Chief Paul Kelley have been indicted or arrested in this matter. Detective Johnson never presented this case to the Stark County Prosecutor or to the Stark County Grand Jury. (Johnson Dep. at 96-97). No charges have resulted from this search and investigation. (Deposition at 96).

T.V. Channel 5 has not followed up the story in any way since the night of the broadcast. Appellee Schock testified that he suggested a follow up, but that the T.V. Station was not interested. (Schock deposition at 45).

Appellees herein moved for summary judgment and appellants opposed the motion with evidentiary materials. After a July 14, 1983 hearing the Court of Common Pleas issued two separate judgment entries and opinions respectively in favor of:

(1) Scripps Howard, Schock and Braun, and

(2) Johnson and Berens.

As to the first group of appellees and the broadcast produced, the court held:

> The court finds the broadcast . . . contained factual statements and that those factual statements were essentially true. The court finds that the gist or sting of the factual statements . . . were true. (August 12, opinion, Para. 1).

As to Johnson and Berens, the court held:

> . . . There appears to be no proof of conspiracy or malice in Deputy Johnson or Sheriff Berens obtaining the search warrant. Absence (sic) of conspiracy and malice and armed with a search warrant that is valid on its face, Deputy Johnson and Sheriff Berens cannot be held liable . . . (August 12, 1983 opinion, P. 2).

Appellants raise the following four assignments of error:

ASSIGNMENT OF ERROR NO. I.

THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THAT PLAINTIFF, LESTER BARBER, WAS A "PUBLIC OFFICIAL" FOR PURPOSES OF THIS LIBEL LITIGATION.

ASSIGNMENT OF ERROR NO. II.

THE TRIAL COURT ERRED BY FINDING THAT THERE WAS NO GENUINE ISSUE AS TO MATERIAL FACT IN FINDING THAT THE BROADCAST OF FEBRUARY 10, 1982 CONTAINED FACTUAL STATEMENTS THAT WERE ESSENTIALLY TRUE.

ASSIGNMENT OF ERROR NO. III.

THE TRIAL COURT ERRED IN FINDING THAT THERE WAS NO GENUINE ISSUE AS TO MATERIAL FACT WITH RESPECT TO ITS FINDING THAT DEFENDANTS DID NOT ACT WITH ACTUAL MALICE.

ASSIGNMENT OF ERROR NO. IV.

THE TRIAL COURT ERRED IN NOT FINDING THAT DEFENDANT JOHNSON EXCEEDED THE SCOPE AND PRIVILEGE OF THE SEARCH WARRANT.

I.

After a review of the authorities and taking note of appellants' argument of a slightly perceptible shift in the judicial definition of a public official, we hold that Lester Barber is a public official for purposes of this action. Being an elected Township Clerk, Mrs. Barber is clearly a public official. This assignment of error is overruled.

II.

By this assignment of error appellants claim that a genuine dispute exists as to whether certain material factual statements of the broadcast were true or not.

Based on the record before us, we find serious questions do exist whether the elements comprising the broadcast were true or false at the time of the broadcast.

The following analysis is a scrutiny of the words themselves and does not touch on the less measurable gist or sting produced by the broadcast.

The broadcast said:

> Sheriff's Deputies swooped down on the home of Fire Chief Lester Barber.

Appellee Detective Johnson, the officer in charge of the raid testified:

> I didn't make that statement and I didn't swoop down on Les Barber's house. (Deposition at 112, line 1).

The closing sentence of the broadcast used the phrase "hiding the boat." Sworn testimony brings out a genuine

dispute as to the material fact issue whether the boat was hidden. In his disposition, Detective Johnson admitted that the boat was visible from Route 183 (page 118, line 4). Lester Barber testified that the boat was "in plain sight of everybody and anybody between the two State highways." (His Dep. at 29). Lester Barber also states that "at no time was the boat hid, never." (Dep. at 29, line 19).

Appellee Schock admits that on the day of the search, Barber told him the boat had been at the Barber property for at least 2½ years:

> SCHOCK: I also asked how long he had had the boat there.
>
> QUESTION: How long did he?
>
> ANSWER: He wasn't certain whether it was two and a half or three and a half years. (Schock deposition, page 35).

Schock testified that on the day of the search, Barber also told him the boat had been stored in the Fire/Police Station for some time and was later moved where it was located on the day of the search. (Schock Dep. at P. 36).

Schock testified that before calling in the story to T.V. 5, Police Chief Paul Kelley "reiterated what Barber said." (Deposition at page 36).

Additionally, Schock admits that Detective Johnson did not dispute to him (Schock) any of the facts of the boat's storage that Barber told him and Kelley corroborated. (Dep. at 37).

Common experience and logic tell us that an individual desiring to hide a piece of property the size of a boat does not store it in a public building and outside on his own property for an uninterrupted period of three and one half (3½) years.

Barber has also testified that the boat was in the same condition on the day of the search as on the day it was found, had never been cleaned up and had never been used during that entire period. (His Dep. at page 15).

There exists contradictory testimony in Johnson's deposition as to the pivotal issue of what he (Johnson) told Reporter Schock regarding Barber being indicted. Schock has averred that Johnson "told me that Chief Barber was one of the persons who might be indicted." (Schock Affidavit, paragraph 14).

However, in deposing Johnson, appellants' counsel correctly read the following quote from the broadcast:

> Both the Police and Fire Chiefs in Lexington Township may soon be indicted.

Counsel then asked:

> I am asking you, based on your being the individual in charge of this investigation into Les Barber, is that statement contained in the first sentence a true statement as of February 10, 1982?

After objections were noted, Johnson chose to answer:

> ANSWER: Not necessarily. (Dep. at 108).
>
> QUESTION: Would you care to explain your answer?
>
> ANSWER: If I took the case to the Stark County Grand Jury . . . the search warrant is for the property of Les Barber . . . *I can't serve a search warrant on a property and prepare the case and take it to the Grand Jury and predict who they are going to indict or not indict. The Grand Jury could indict at their vote.* (Deposition at 109). (Emphasis ours).

The plain meaning of the above is that Johnson did not tell Schock that appellant Barber "may soon be indicted." Had Johnson told Schock that Lester Barber would "soon

be indicted" or words to that effect, it would have been a simple task for Johnson to relate that in his testimony by plainly answering in the affirmative.

Our evaluation of his testimony is buttressed by the following direct exchange:

> QUESTION: Did you tell Larry Schock that you were going to ask for an indictment against the Fire Chief for hiding the boat?
>
> MR. LeFAIVER: Objection.
>
> ANSWER: No. (Deposition at 117, line 17).
>
> MR. LIEBERTH: Okay, I think he answered the question. Did you get his answer?
>
> MR. CEFARATTI: Yes, I did.

Reasonable minds could find, based on the facts Schock knew on February 10, 1982, that the assertion that Fire Chief Barber and Police Chief Kelly were "soon to be indicted" for "hiding the boat," clearly a defamatory statement, was made with the knowledge it was false or with a reckless disregard of whether it was true or false.

What Johnson told Schock is of paramount importance because it reveals Schock's "state of mind" at the time of the alleged libel.

Counsel for appellee Scripps Howard argues to this court that "precisely how Johnson expressed his comments is not what matters." (Brief at 23). However, counsel earlier urged the opposite approach be taken to Johnson's testimony:

> What they (appellants) do is they ignore Johnson's direct testimony . . . let me read the exact testimony. The exact testimony . . . (Transcript of proceedings, page 16).

Since words and their plain meaning are what any libel case is all about, this court will choose appellee's approach at the hearing—that of interpreting the words as stated and recorded.

In overruling a summary judgment in an invasion of privacy action, the Third District Court of Appeals focused on one "not exactly" answer made by a police officer in response to a question of whether he was "bugged" or not. *Shifflet* v. *Sansotta*, Marion County, unreported decision of June 18, 1982, case number 9-80-41.

In the instant case there is more than one example of conflicting, ambiguous testimony in Johnson's deposition of the "not exactly" genre.

This ambiguity is further exacerbated by Schock throwing away his notes taken that day (Depostion at 24) and by a memorandum he prepared for appellee Braun about the events that day demagnetized and erased from Schock's home computer. (Deposition at 26).

The broadcast effectively accuses the Barbers of violating the Ohio Criminal Code Section 2913.51(A) which reads as follows:

> (A) No person shall receive, retain, or dispose of property of another, knowing or having reasonable cause to believe that the property has been obtained through commission of a theft offense.

The Drafting Committee comment on that section reads:

> Committee Comment to H 511
>
> This section differs from the former offense of receiving stolen property in two important respects. Under the former statute an offender actually had to know that the property received was stolen property, whereas under this section it is sufficient if the offender has reasonable cause to believe that the

property is "hot." Also, the former offense involved receiving only property obtained as the result of larceny, robbery, embezzlement, larceny by trick, or fraud. Under this section, any theft offense can be the means by which the property was obtained.

The penalty for receiving stolen property is identical to the penalty for theft. See new section 2913.02 of the Revised Code.

It is to be noted that "concealing" is not an element of the crime. The presence or absence of "concealment" may shed light, however, upon the actor's state of mind as to knowing or not that the property had been obtained through the commission of a theft offense.

The fact as to concealment or the absence of it is both material and genuinely disputed.

Jurors acting reasonably could find the accusation to be false and could further find that the evidence shows with convincing clarity that it was falsely made with actual malice.

The statements about what a Grand Jury might do in the future weigh in the balance only insofar as they function as an accusation of present guilt and demonstrate the reporters' willingness to speak with reckless disregard of the truth. See N.Y. Times v. Sullivan (1964), 376 U.S. 254.

Such a statement is merely a forecast or prediction of future conduct of human beings. As such, it is incapable of measurement in terms of present truth or falsity. Nevertheless, such statement clearly connotes to a substantial portion of the community an accusation of present guilt of crime.

This assignment of error is sustained.

III.

To the extent that this assignment of error reaches the matters discussed under the second assignment of error, it is well taken and sustained.

The balance of the assignment is an incorrect characterization of the opinion of the trial court and, as such, is overruled.

IV.

There is no evidence in the record demonstrating that Detective Johnson exceeded the scope and privilege of the search warrant. This assignment of error is overruled.

Having sustained appellants' second assignment of error and overruled the others, the summary judgment of the Court of Common Pleas of Stark County, Ohio as to appellees Scripps Howard Broadcasting Corporation, Larry Schock and Eric Braun is reversed and the case is remanded to said court for further proceedings consistent with this opinion.

The summary judgment as to appellees Robert Berens and William Johnson is affirmed.

Putnam, P.J. and
Milligan, J. concur.

APPENDIX C

[Judgment and Opinion by the
Court of Common Pleas of Stark County, Ohio]

STATE OF OHIO, STARK COUNTY:
SS:
IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

CASE NO. 82-1091 OT

LESTER J. BARBER, *et. al.*,
Plaintiffs,

v.

SCRIPPS-HOWARD BROADCASTING CORP. *et al.*,
Defendants.

FILED
HELEN J. GAROFALO
Clerk of Courts
STARK COUNTY, OHIO
Aug. 12, 1983

JUDGMENT ENTRY—OPINION

This came before the Court upon Motion of Scripps-Howard Broadcasting Corporation for Summary Judgment on the grounds that there is no genuine issue as to any material fact and that the Defendants were entitled to judgment as a matter of law. The Court finds [the] Motion is timely considered in that all discovery has been completed.

After hearing and Memorandum of Law submitted by both parties, the Court makes the following Findings:

1. Based upon the facts submitted via the transcripts of depositions of Lester Barber and Janet Barber, of Larry Schock and of Deputy Johnson, the Court finds that the broadcast of February 10, 1982 on the eleven o'clock Eyewitness News, contained factual statements and that those factual statements were essentially true. The Court finds that the gist or sting of the factual statements contained in the news broadcast were true and therefore upholds Defendant's Motion for Summary Judgment on ground number one.

2. The Court finds that Lester Barber and his wife were clearly public officials. The Court finds that a "public official applies [at] the very least, to those among the hierarchy of government employees who have or appear to have, to the public, a substantial responsibility for the control and the conduct of government affairs." *Rosenblatt* v. *Baer*, 383 U.S. 75 (1966).

In Ohio "the most decisive characteristic of a public officer is determined by the quality of the duties to be performed . . . and by the fact that such duties are conferred upon an incumbent by a position of law." 14 O. Jur. 3, 538 Civil Servants Section 14.

Ohio Jurisprudence 3rd goes on further to describe a public function: "If the incumbent of a position receives his authority from the law and discharges some of the functions of government, he will be considered a public officer. Such exercise must, however, be by virtue of his election or appointment to the office . . . an individual on whom is devolved the performance of independent statutory duties that to some extent involve the exercise of a part of the sovereignty of a state, not subject to the direction and control of statutory authority is generally considered a public officer." 14 O. Jur. 3, 590, Civil Servants Section 15.

After a review of Ohio Revised Code Section 3737.24 entitled Investigation of Cause of a Fire, and Ohio Revised Code Section 3781.03, entitled Enforcement, Supervision and Records, the State Legislature has vested upon a fire chief of a township, the duty to enforce building safety provisions and to investigate fires and the cause of fires and therefore perform independent statutory duties.

Both statutes clearly meet the test of a public officer. A township fire chief of a fire department exercises his duties independently, especially in light of the Ohio Revised Code.

Furthermore, the position of a fire chief of a township is specifically created by Ohio Revised Code Section 505.38. The position is created and referred to as an officer in relevant statutes and therefore is vested in the position by law. The authority and duty are functions of the government, exercised on behalf of the public. The statutory powers are exercised by virtue of the persons appointed to the office of fire chief of the township. The position of a volunteer fire chief of a township clearly meets the test of public official enumerated in *Rosenblatt* v. *Baer*, *supra*.

Mrs. Barber is clearly a public official that has been elected by the constituents of Lexington Township and falls within all the requirements of being a public official.

In order for the Plaintiffs to maintain their position, once it has been determined that the Plaintiffs are public officials, they must show actual malice in order to recover in this case under either a defamation or false-light invasion of privacy. Based upon the finding number one, there being no factual inaccuracy of the Eyewitness News Report, the Court finds that Defendants are entitled to judgment as a matter of law.

3. On the issue of trespass, the Court finds no trespass from the undisputed facts and therefore grants Defendant's Motion for Summary Judgment.

Based upon the above conclusions the Court finds Defendant's Motion is well taken on the issue of invasion of privacy.

Based upon the record, exhibits and memoranda herein, the Court finds that there exists no genuine issue as to material fact and the Defendants are entitled to judgment as a matter of law.

HON. SHEILA G. FARMER

DATED: 08/03/83

APPENDIX D

[Judgment by the Supreme Court of Ohio
(same as Appendix A)]

[IN THE SUPREME COURT OF THE STATE OF OHIO]

THE STATE OF OHIO, City of Columbus

1984 TERM

To wit: April 18, 1984

No. 84-342

LESTER J. BARBER,
Appellees/Cross-Appellants,
v.
SCRIPPS-HOWARD BROADCASTING CORP., *et al.*,
Appellants/Cross-Appellees.

APPEAL AND CROSS-APPEAL FROM THE COURT OF APPEALS FOR STARK COUNTY

This cause, here on appeal as of right from the Court of Appeals for Stark County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court *sua sponte* dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Stark County for entry.

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

APPENDIX E

[Deposition of William L. Johnson, Exhibit 1]

AFFIDAVIT FOR SEARCH WARRANT[1]

IN THE COMMON PLEAS COURT
STARK COUNTY, OHIO

AFFIDAVIT FOR SEARCH WARRANT

STATE OF OHIO

v.

LESTER J. BARBER

BEFORE WILLIAM A. MORRIS, Judge

The undersigned being duly sworn deposes and says: That he has reason to believe that on the premises known as: 14695 Gaskill N.E., Lexington Township, Stark County, Ohio, next to a certain garage located to the rear of said property and or in said garage which is a 40 x 40 cement block single story two stall structure located in the Township of Lexington, Stark County, Ohio, there is now being concealed certain property, namely:

---

[1] A night time search may be conducted if the search commences any time before 7:00 A.M., or aft[illegible] 8:00 P.M., but only if the issuing Judge by appropriate provision in the Warrant, and for reasonable cause shown, authorizes the issuance of the Search Warrant at times other than daytime. Accordingly, the Affidavit should contain facts developing such "reasonable cause for a night time search" if a night time search warrant is to be requested.

(Description)

> One 1959 Lonestar runabout outboard motor boat, Lic. #OH 3822, Serial #92935073, 40 HP Johnson outboard motor, Mod NR RdSL 293, Serial #NR 2739384, 2 oars, six life jackets, one marine 12vt. battery, fire extinguisher, 2 anchors, 3 speed electric Shakespear trolling motor

which are [2] (Give alleged grounds for search and seizure) evidence of the commission of a criminal offense, to wit: Receiving Stolen Property, (Sec. 2913.51 O.R.C.).

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

I, William L. Johnson, am a Detective with the Stark County Sheriff's Office. The above described boat and equipment were stolen from Gene Dawson in August 1979 from a location at Berlin Dam. On or about January 30, 1982 I received information possibly the equipment were at the location described above where he personally observed the boat covered by a truck cap and plywood. A second informant, confirmed that he had also seen the boat there within the last 24 hours. I have personally observed the area to be searched and have confirmed that an object is concealed under a truck cap and plywood at the side of the garage as described as the hiding place of the boat by the informants.

---

[2] RULE 41(B) of the Ohio Rules of Criminal Procedure provides: "A Warrant may be issued under this Rule to search for and seize any: 1) evidence of the commission of a criminal offense; or 2) contraband, the fruits of crime, or things otherwise criminally possessed; or 3) weapons or other things by means of which a crime has been committed or reasonably appears about to be committed."

/s/ William L. Johnson

(Signature & Title of Affiant)
Sworn to before me, and subscribed in my presence, 2/10, 1982.

/s/ William A. Morris

JUDGE OF THE COMMON PLEAS COURT

APPENDIX F

[Deposition of William L. Johnson, Exhibit 2]

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

SEARCH WARRANT
DAYTIME ONLY[1]

STATE OF OHIO,

v.

LESTER J. BARBER

To the Sheriff of Stark County and all his Deputies:

To any Police Officer of the City of Canton, Stark County, Ohio:

Affidavit having been made before me by William L. Johnson that he has reason to believe that (on the premises known as) 14695 Gaskill N. E., Lexington Township, Stark County, Ohio, next to a certain garage located to the rear of said property and or in said garage which is a 40 x 40 cement block single story two stall structure located in the Township of Lexington, Stark County, Ohio, there is now being concealed certain property, namely: (describe property)

One 1959 Lonestar runabout outboard motor boat Lic. #OH 3822 Serial #92935073, 40 HP Johnson outboard motor Mod NR RdSL 293, Serial # NR 2739384, 2 oars,

---

[1] The term "daytime" is defined to mean the hours from 7:00 A.M. to 8:00 P.M. This Warrant, when issued by the Judge, may be used only when executed between the time of 7:00 A.M. and 8:00 P.M.

six life jackets, Shakespear trolling motor which are[2] (give alleged grounds for search and seizure) evidence of the commission of a criminal offense, to-wit: Receiving Stolen Property (Sec. 2913.51 O.R.C.).

and I am satisfied that there is probable cause to believe that the property so described is being concealed on the premises above described and that the foregoing grounds for application for issuance of the search warrant pursuant to Rule 41(B) of the Ohio Rules of Criminal Procedure exist.

YOU ARE HEREBY COMMANDED to search forthwith the place named for the property specified, serving this warrant and making the search in the daytime, and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this Warrant and bring the property before me within three [3] days of this date, as required by the law.

Dated this 10th day of Feb., 1982

/s/ William A. Morris

JUDGE OF THE COMMON PLEAS COURT

---

[2] RULE 41(B) of the Ohio Rules of Criminal Procedure provides: "A Warrant may be issued under this Rule to search for and seize any:

(1) evidence of the commission of a criminal offense; or

(2) contraband, the fruits of crime, or things otherwise criminally possessed; or

(3) weapons or other things by means of which a crime had been committed or reasonably appears to be committed."

RETURN[3]

Feb. 10, 1982

I received the attached search warrant Feb. 10, 1982, and have executed it as follows:

On Feb. 10, 1982 at 4:00 o'clock PM, I searched the person/premises described in the warrant and I left a copy of the warrant with[4] Lester J. Barber together with a receipt for the items seized.

ATTACHED is an inventory of property taken pursuant to the Warrant.

/s/ William L. Johnson[5]

---

[3] The Return is to be signed by the officer who made the search and completes and verifies the inventory, a copy of which is to be attached to the Return. The Return is to be taken back to the Judge who issued the Search Warrant. Pursuant to Rule 41(E) of the Ohio Rules of Criminal Procedure, the Judge before whom the Warrant is returned shall attach to the Warrant a copy of the Return, inventory, and all other papers in connection therewith (which includes the Affidavit and transcript of any sworn testimony), and shall file them with the Clerk.

[4] Name of person searched or owner or "at the place of search"

[5] To be signed by the officer who made the search and compiled and verified the inventory.

APPENDIX G

[Deposition of William L. Johnson, Exhibit 4]

REPORT OF INVESTIGATION

Case No. 82-801, Date: Wednesday, February 10, 1982

SUBJECT: SUPPLEMENT TO SEARCH WARRANT/ RECOVERED STOLEN PROPERTY LEXINGTON TWP. 2045 hr

COMPLAINANT:	DETECTIVE WILLIAM JOHNSON U-35 STARK COUNTY SHERIFF'S OFFICE
RECOVERED PROPERTY:	(1) 1959 LONE STAR, green & white, outboard motor boat, O/L: OH3822AD, 1979 issue, serial #92935073, 14' in length. 40 horsepower JOHNSON outboard, serial #J2739384, model #RDSL29E
LOCATION RECOVERED:	14695 Gaskill N.E., rear of the garage
OWNER OF LOCATION:	LESTER D. BARBER residence Same as location recovered DOB: 11/12/29—SSN: 282-26-9927
ARRIVAL TIME:	1600 hrs. date

REMARKS: The reporting officer acting on information provided through informants that a stolen boat motor and contents would be located at the LESTER BARBER residence at the above address, did obtain a search warrant on this date from the Stark County Prosecutor's

Office. After this warrant was signed by JUDGE MORRIS, the reporting officer went to the residence of LESTER BARBER with SGT. THOMAS TAYLOR U-63, and DEPUTY ELDEN WORKINGER U-131, and an independent witness, LARRY A. SCHOCK.

Upon arrival at the driveway of the residence, MR. LESTER J. BARBER was served his copy of a search warrant, naming the articles to be searched in the adjacent garage. At the time, MR. BARBER led the reporting officer and all others present to the rear of the garage, showing an outboard motor boat with a motor lying within the hall [sic], covered by a truck camper cap and protected from the north side, by several sheets of plywood. It was nearly impossible at first glance to determine whether there was actually a boat concealed or not. After taking numerous photographs of the location of the boat, the truck camper cap and other items were moved from the top of the boat and from the side and it was pulled from the location by MR. BARBER, in his jeep to the driveway of the residence. At that time, a search was made of MR. BARBER'S garage in an attempt to locate other articles that were missing from the boat when stolen, namely oars, life jackets, marine battery, trolling motor and etc. The search of this garage proved negative and was conducted by the reporting officer, SGT. TAYLOR & DEPUTY WORKINGER.

DICKEN & MARSHALL SPORTS CENTER of 817 South Union Ave., Alliance, Ohio, Phone: 823-7178, was summoned to the scene with a boat trailer, in order to transfer the boat from its present trailer onto the other trailer, in order to transport it to the Stark County Jail. After the boat was transferred from the trailer that it was presently sitting on, onto the trailer owned by the DICKEN & MARSHALL SPORTS CENTER COMPANY, it was transported to the Stark County Jail and placed in

the garage and tagged as evidence. At 1700 hrs. date, all officers did leave the residence and a copy of the search warrant was left with MR. BARBER and also a copy of the inventory. Five (5) photographs of the location of the boat when first found will be attached to this report and ten (10) photographs taken in the basement of the Stark County Jail of the serial number of the boat, serial number of the motor and the exterior of the boat.

It is to be noted that approximately 5-7 minutes after 1600 hrs., the above date, CHIEF PAUL KELLEY of the Lexington Township Police Department did arrive at the property being searched and did go into the residence and speak with MRS. BARBER. After a couple of minutes, CHIEF PAUL KELLEY did come to the back of the garage area, where photographs were being taken of the boat. Idol [sic] conversation from CHIEF PAUL KELLEY to the reporting officer, consisted of the Fire Chief attempted for several months to find the owner of the boat and couldn't locate him. He then asked the reporting officer, if I (reporting officer) had in fact located the owner and a reply of affirmative was given to him. He then asked if the boat was in fact stolen. I (reporting officer) told him, in fact it was. He asked how long ago, the boat was in fact stolen and the reporting officer did not reply. While still taking photographs of the boat, CHIEF PAUL KELLEY did leave the scene and went into the residence. Several minutes later, he did come out of the residence again and walked around where we were looking at the boat and made very little conversation and went back into the residence.

While searching the interior of the garage, MR. BARBER who was present, stated that his wife was presently in the house checking the records as to what year the boat was actually recovered. A few moments later, his wife came into the garage and stated that she checked through

the year of 1973 and was unable to locate any record of a recovered boat. Reporting officer then asked if she would mind checking for the year of 1979 and she replied she would. At that time, MR. LESTER BARBER stated, he would check his records and supply the reporting officer with the information that would have been placed on a report at the time the boat was actually taken from the water and taken to the Fire Department.

On Thursday, 2/11/82, the reporting officer will deliver to the Stark County Prosecutor's Office, copies of the search warrant, affidavit and inventory sheets for proper filing and will attempt to get a release order from the Judge, so that the boat may be returned to its [sic] proper owner and that the trailer, which the boat is presently sitting on, can be delivered back to the DICKEN & MARSHALL SPORTS CENTER. It is also to be noted that a release must be provided before the proper owner can remove the boat from the Stark County Jail, and this release must be gotten from DICKEN & MARSHALL SPORTS CENTER.

Attached to this report, will be copies of the search warrant, affidavit and inventory.

Investigation to continue.

Signature /s/ Detective William Johnson U-35

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(2)

No. 84-86

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

Scripps-Howard Broadcasting Company,
Eric Braun, and Larry Schock,

Petitioners

v.

Lester J. Barber and Janet E. Barber,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DAVID A. LIEBERTH
Counsel of Record

BLAKEMORE, ROSEN, MEEKER
& VARIAN CO., L.P.A.
277 South Broadway
Akron, Ohio 44308
(216) 253-3337
Counsel for Respondents

BEST AVAILABLE COPY

QUESTION PRESENTED FOR REVIEW

Whether the Constitution requires that this Court undertake an independent review of the record and reinstate summary judgment in a defamation action when the state appellate court overruled the grant of summary judgment on the ground that genuine issues as to material fact remained.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

No. 84-86

Scripps-Howard Broadcasting Company, et al.,

Petitioners

v.

Lester J. Barber, et al.,

Respondents

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Respondents, Lester J. Barber and Janet E. Barber, respectfully pray that a writ of certiorari to review the judgment and order of the Supreme Court of Ohio entered in this defamation action on April 18, 1984 be denied.

STATEMENT OF THE CASE

This case centers on an abandoned 10-foot rowboat which was recovered by the Lexington Township Volunteer Fire Department in July, 1978. Upon finding the boat overturned in

Berlin Reservoir, the Lexington volunteers proceeded to drag the reservoir in search of a body. None was found. Police Chief Paul Kelly transmitted the boat's registration numbers to the statewide LEADS computer in an attempt to identify the boat's owner.

Subsequently, Lester Barber, the volunteer fire chief of Lexington Township, contacted the Coast Guard and the Army Corp of Engineers and requested their assistance in identifying the owner of the boat. All efforts failed, so the boat was stored first in Mr. Barber's backyard, then at the fire department garage and eventually back in Mr. Barber's yard where it was found on February 10, 1982.

The recovery of the boat by Stark County Sheriff's deputies, through the use of an unnecessary search warrant was reported on WEWS TV's 11:00 p.m. Eyewitness News. Viewers of the broadcast were informed that the top story of the day in all of northeast Ohio was that "a police and fire chief in Stark County appear

to be in lots of hot water." The news story that is the subject of this lawsuit was then broadcast. (J.A. 7a).

As of this date, Mr. Barber has been neither arrested nor indicted. In fact, additional information has not even been taken to the Stark County Prosecutor or the Grand Jury.

WEWS TV has never cleared Mr. Barber's reputation. Even though Schock, the reporter of the story, claims to have suggested a follow-up story to WEWS TV, his supervisors "were not interested in covering the story any further." (Deposition of Schock at 45).

ARGUMENT AGAINST GRANTING CERTIORARI

The desperation of the Petitioners' cause is evidenced by the wholly inaccurate suggestion that Ohio Appellate Courts have "resolved" to penalize Ohio news organizations "at every opportunity in the most frivolous of defamation suits". (Petition at 3, n. 1).

To the contrary, the Appellate Courts of Ohio have erected substantial barriers for any public official to maintain a libel action against a media defendant, and have rigidly followed this Court's guidelines with respect to reviewing constitutionally protected First Amendment rights of news organizations.

The Ohio Rules governing the decisions of the lower courts in this case are set forth in Dupler v. Mansfield Journal, 64 Ohio St. 2d 116 (1980), cert. denied 452 U.S.962 and Bukky v. Painesville Telegraph

& Lake Geauga Printing Company, 68 Ohio St. 2d 45 (1981). They hold as follows:

> In order to withstand Defendant's Motion for Summary Judgment in a libel action brought by a public official, the Plaintiff must produce evidence sufficient to raise a genuine issue of material fact from which a reasonable jury could find actual malice with convincing clarity.

Bukky, syllabus.

This rule balances the first amendment principles of free press, the seventh amendment rights to a jury trial, and Rule 56(C) of the Ohio Rules of Civil Procedure governing the grant of summary judgment.

This impediment to maintaining a libel action is so severe, that the Chief Justice of the Ohio Supreme Court was forced to dissent in Bukky:

> With one judicial body blow, the Court today effectively eliminates, as a practical remedy, the ability of any public official or public figure to prosecute a successful defamation action. Since I believe that we should balance our concern for an uninhibited vigorous free

> press with a genuine awareness of a defamation plaintiff's legitimate interest in redressing wrongful injury, I respectfully dissent.

Bukky at 48, (Celebrezze, C.J. dissenting). The Petitioners exercise a rare form of legal gymnastics in suggesting that the Ohio Courts have failed to follow the decision of this Court in Bose Corp. v. Consumers Union, 104 S.Ct. 1949 (1984). It is apparent from the opinion of the Appellate Court that it observed and carried out its duty of an independent review of the record as required.

The Trial Court entered a summary judgment for WEWS TV upon its finding that the news report was not factually inaccurate and Petitioners were, therefore, entitled to judgment as a matter of law. In exercising its independent appellate review, the Stark County Court of Appeals was unable to rule that the record was devoid of genuine issues of fact as to the factual accuracy of the newscast: "Based on the record before

us, we find serious questions do exist whether the elements comprising the broadcast were true or false at the time of the broadcast." (J.A. 10a). Because of the Appeals Court's finding, summary judgment was inappropriate and properly overruled.

The existence of genuine issues of fact as to actual malice was never discussed by the Trial Court since it found that the newscast was not inaccurate, and therefore not defamatory. Nevertheless, the Court of Appeals properly dealt with the issue of actual malice by stating, "(j)urors acting reasonably could find the accusation to be false and could further find that the evidence shows with convincing clarity that it was falsely made with actual malice." (J.A. 15a). This holding reflects the Court's correct application of the standard of review set forth in Dupler and Bukky, supra.

The remedy of summary judgment is so drastic that it should be utilized with great

caution and only in those cases where the justice of its application is unusually clear. Even in defamation cases summary judgment is proper only if there exists no genuine issue as to any material fact. Clark v. American Broadcasting Companies, Inc., 684 F.2d 1208 (6th Cir. 1982) (emphasis added). Here, a total review of the record reveals that chief Barber did seek assistance in identifying the owner of the missing boat (Affidavit of Barber at 11); that Barber maintained the boat for three years in a manner wholly unsecretive, (Barber Deposition at 18) which the reporter Schock even acknowledged had been told to him by the Chief (Schock Deposition at 36); forcing the Court to conclude:

> Common experience and logic tells us that an individual desiring to hide a piece of property the size of a boat does not store it in a public building and outside on his own property for an uninterrupted period of three and one-half years.

(J.A. 11a).

In reviewing the entirety of the record, the Appellate Court also had before it the affidavit of Janet Barber and deposition of reporter Schock, in which a confrontation between the two of them months before the incident here is documented, which resulted in the filing of a complaint to defendant Schock's employer (Affidavit of Janet Barber).

The Petitioner, a large television station in one of America's largest television markets, suggests that the volunteer fire chief of rural Lexington Township is "harassing" them with this litigation. To the contrary, a total review of the record reveals that WEWS TV was doing at least one story per week about the Sheriff of Stark County or his office (Schock Deposition at 16); so many stories, that reporter Schock could not even guess at the number of times he had interviewed the Sheriff (Schock Deposition at 16). This is not a case where Petitioners were "watchdogs" of the public so much as they served as

"pet dog" of a single elected office holder who chose to obtain and execute a search warrant that resulted in great publicity, but not an arrest, and not even so much as a presentation of the evidence to the grand jury. Curiously, WEWS TV "was not interested" in carrying a subsequent story to even clarify the event (Schock Deposition at 45).

Certainly, the threat of being put to the defense of a lawsuit may be chilling to the exercise of First Amendment freedoms. Washington Post Company v. Keogh, 365 F.2d 965 (D.C. Cir. 1966), cert. denied 385 U.S. 1011 (1967) and while Petitioners assert this chilling effect as reason sufficient for the grant of their Petition, Respondents rely on the common sense approach of Chief Justice Burger in Hutchinson v. Proxmire, 443 U.S. 111 (1979):

> We are constained to express some doubt about the so-called "rule". The proof of "actual malice" calls a defendant's state of mind into question, New York Times v. Sullivan, 376 U.S. 254 (1964) and does not

> readily lend itself to summary disposition.

Hutchinson, 443 U.S. at 153 (1979). State of mind should generally be a jury issue. Poller v. Columbia Broadcasting System, 368 U.S. 464 (1962).

Principles followed by the Federal Courts in granting summary judgment* have been adopted by the Ohio Courts as their standard of review for motions for summary judgment; namely, that inferences to be drawn from the underlying facts contained in the record must be viewed in the light most favorable to the party opposing the motion and if when so

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*Nader v. DeToledano, 408 A.2d 31 (D.C. 1979), cert. denied 444 U.S. 1078 (1980); Schultz v. Newsweek, Inc., 668 F.2d 911 (6th Cir. 1982); Yiamouyiannis v. Consumers Union, 619 F.2d 932 (2d Cir.) cert. denied 449 U.S. 839 (1980).

viewed reasonable minds can come to differing conclusions, the motion must be overruled. Williams v. Church, 37 Ohio St. 2d 150 (1974). As here, where a genuine issue of fact exists and where competing inferences may be drawn from undisputed underlying evidence, or when facts present are uncertain or indefinite, the Court must deny a Motion for Summary Judgment.

The issue presented to this Court by Petitioners has been resolved by the Ohio Supreme Court both in Dupler and Bukky, supra. Therefore, the Petition for Writ of Certiorari must be denied.

Respectfully submitted,

DAVID A. LIEBERTH
Counsel of Record

BLAKEMORE, ROSEN, MEEKER
& VARIAN CO., L.P.A.
277 South Broadway
Akron, Ohio 44308
(216) 253-3337
Counsel for Respondents